# Khor Boon Hoch (trading as Jiann Wei Foundry) v Tong Beng Han (in the capacity as executor of the estate of Tang Kah Choo, deceased)

HIGH COURT (GEORGETOWN) — BANKRUPTCY SUIT NO 29NCC-60–01 OF 2014
LIM CHONG FONG JC
14 JANUARY 2016

*Bankruptcy — Setting aside — Application to set aside — Creditor's petition and bankruptcy notice — Whether settlement had been reached between parties precluding filing of bankruptcy proceedings — Whether failure to serve bankruptcy notice and application to issue bankruptcy notice on judgment debtor in contravention of Bankruptcy Rules 1969 — Whether judgment creditor acted ultra vires without proper authority to commence bankruptcy proceedings — Whether amount owing in bankruptcy notice was excessive — Whether bankruptcy notice issued in bad faith*

*Succession — Executors — Powers of — Commencement of legal proceedings — Whether executor could initiate bankruptcy proceedings to recover debt due to deceased — Whether executor's powers fettered or circumscribed by s 59 of Probate and Administration Act 1959*

The senior assistant registrar ('SAR') had allowed the judgment debtor's ('JD') applications to set aside the bankruptcy notice and the creditor's petition respectively. Hence the present appeals against the said decisions of the SAR. On 11 March 2013, the judgment creditor ('JC') obtained summary judgment ('the judgment') against the JD in the sessions court. The appeal against the judgment was dismissed by the High Court. On 28 November 2013, the JD proposed to the JC to settle the judgment by way of installment payments. The proposal was rejected by the JC. Consequently, the JC filed the request for issuance of bankruptcy notice against the JD and the bankruptcy notice was served on the JD on 25 January 2014. On 7 February 2014, the JD again proposed to the JC to settle the judgment by way of installment payments and that the bankruptcy proceedings be withheld till the completion of payment. The proposal was rejected by the JC. The JC on 19 February 2014 filed the creditor's petition. The parties thereafter unsuccessfully underwent mediation. Thereafter the JD had applied to set aside the bankruptcy notice and creditor's petition. The JD in opposing the applications had contended: (a) that there was a settlement reached between the parties and that this settlement created a new cause of action hence precluding the JC from relying on the judgment; (b) that the bankruptcy notice was defective since its the service of the bankruptcy

notice was wrong in contravention of rr 97 and 109 of the Bankruptcy Rules 1969 ('the Rules'); the JC acted ultra vires as there was no power conferred upon him under will of Tang Kah Choo, deceased; the JC could not initiate bankruptcy proceedings against anyone; the JC commenced bankruptcy proceedings against the JD without the consent or approval of the beneficiaries under the will; the JC failed to serve the application to issue the bankruptcy notice to the JD in contravention of r 92 of the Rules; the particulars of amount owing in the bankruptcy notice was excessive; the bankruptcy notice was not served on the JD together with application to issue the bankruptcy notice; and (c) that the bankruptcy notice was issued in bad faith.

**Held,** allowing the appeals:

(1) The parties did not achieve *consensus ad idem*. This consensus is essential to form a binding contract including that of a settlement. The parties were still ironing out the terms of the alleged settlement. Although the parties had undergone mediation, there was no record of a final executed agreement by the parties that evidenced a settlement. Only certain preliminary matters were sorted out in principle by the parties in the mediation. Hence, there was no concluded and binding settlement as that alleged by the JD (see paras 23–25).

(2) There was neither a new cause of action nor estoppel that operated against the JC that precluded him from proceeding with bankruptcy proceeding in reliance on the judgment (see para 25).

(3) The JC in his capacity as the executor of the estate of Tang Kah Hoo could commence any legal proceeding including the initiation of bankruptcy proceedings to recover the debt due to the deceased. Section 59 of the Probate and Administration Act 1959 does not fetter or circumscribe that power of the executor in any way. Thus, the JD's contention that the power must be derived from the will and that the requirement of consent of all named beneficiaries in the will before the power could be exercised was simply unfounded (see paras 30–31).

(4) The JC properly served the application to issue bankruptcy notice and the bankruptcy notice itself to the JD in compliance with the Rules (see para 34).

(5) The bankruptcy notice was served on the JD on 25 January 2014 but the JD's affidavit that supposedly contested the amount claimed was only filed on 5 February 2014. It was not served within the stipulated seven days. Moreover, the affidavit did not reveal that the JD had a counterclaim, set off or cross-demand against the JC which equaled or exceeded the amount of the judgment debt. The JD did not also by notice as provided in s 3(2)(ii) of the Bankruptcy Act 1967 dispute the amount actually due as claimed in the bankruptcy notice. In fact, the amount

claimed tallied with the judgment. Hence, the JD's contention on excessiveness of the amount claim was without merit (see paras 36–38). A

(6) The JC was merely exercising his rights as the executor to enforce the judgment. There is nothing objectionable for a successful litigant to pursue the fruits of judgment. Hence, the initiation of the bankruptcy proceedings was not done in bad faith (see paras 41–42). B

**[Bahasa Malaysia summary**

Penolong kanan pendaftar ('PKP') telah membenarkan permohonan penghutang kehakiman untuk mengetepikan notis kebankrapan dan petisyen pemiutang penghakiman ('JD'). Oleh itu rayuan ini terhadap keputusan tersebut oleh PKP. Pada 11 Mac 2013, pemiutang penghakiman ('JC') memperoleh penghakiman terus ('penghakiman') terhadap JD di mahkamah sesyen. Rayuan terhadap penghakiman tersebut ditolak oleh Mahkamah Tinggi. Pada 28 November 2013, JD mencadangkan kepada JC untuk menyelesaikan penghakiman melalui bayaran ansuran. Cadangan tersebut ditolak oleh JC. Sehubungan dengan itu, JC memfailkan permintaan untuk mengeluarkan notis kebankrapan terhadap JD dan notis kebankrapan itu telah disampaikan kepada JD pada 25 Januari 2014. Pada 7 Februari 2014, JD sekali lagi mencadangkan kepada JC untuk menyelesaikan penghakiman melalui bayaran ansuran dan bahawa prosiding kebankrapan akan digantung sehingga selesai pembayaran. Cadangan tersebut ditolak oleh JC. JC pada 19 Februari 2014 memfailkan petisyen pemiutang. Pihak-pihak selepas itu tidak berjaya menjalani pengantaraan. Selepas itu JD memohon untuk mengetepikan notis kebankrapan dan petisyen pemiutang. JD dalam menentang permohonan tersebut menegaskan: (a) bahawa terdapat satu penyelesaian yang dicapai antara pihak-pihak dan bahawa penyelesaian ini mewujudkan satu kausa tindakan baru yang menghalang JC daripada bergantung kepada penghakiman; (b) bahawa notis kebankrapan adalah cacat kerana penyerahan notis kebankrapan adalah bercanggah dengan kaedah 97 dan 109 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah'); JC bertindak ultra vires kerana tiada kuasa yang diberikan kepadanya di bawah wasiat Tang Kah Choo, si mati; JC tidak boleh memulakan prosiding kebankrapan terhadap sesiapa; JC memulakan prosiding kebankrapan terhadap JD tanpa persetujuan atau kelulusan benefisiari di bawah wasiat; JC gagal untuk menyerahkan permohonan untuk mengeluarkan notis kebankrapan kepada JD yang bercanggah dengan kaedah 92 Kaedah-Kaedah; butir-butir amaun terhutang dalam notis kebankrapan tersebut adalah berlebihan; notis kebankrapan tidak diserahkan kepada JD bersama dengan permohonan untuk mengeluarkan notis kebankrapan; dan (c) bahawa notis kebankrapan telah dikeluarkan dengan niat jahat.

C D E F G H I

**Diputuskan,** membenarkan rayuan:

(1) Pihak-pihak tidak mencapai *consensus ad idem*. Persetujuan ini adalah

penting untuk membentuk kontrak yang mengikat termasuklah satu penyelesaian. Pihak-pihak masih membincangkan terma-terma penyelesaian yang didakwa. Walaupun pihak-pihak telah menjalani pengantaraan, tiada rekod perjanjian muktamad yang dimasuki oleh pihak-pihak yang membuktikan satu penyelesaian. Hanya beberapa perkara permulaan yang diselesaikan pada dasarnya oleh pihak-pihak dalam pengantaraan. Oleh itu, tiada penyelesaian yang mengikat dan disimpulkan seperti apa yang didakwa oleh JD (lihat perenggan 23–25).

(2) Tidak terdapat kausa tindakan baru mahupun estopel yang boleh dilaksanakan terhadap JC yang menghalangnya daripada meneruskan dengan prosiding kebankrapan bergantung kepada pertimbangan (lihat perenggan 25).

(3) JC dalam kapasitinya sebagai wasi estet Tang Kah Hoo boleh memulakan apa-apa prosiding undang-undang termasuk memulakan prosiding kebankrapan untuk mendapatkan hutang yang belum langsai kepada si mati. Seksyen 59 Probet dan Pentadbiran 1959 tidak menetapkan atau membatasi kuasa wasi dalam apa jua cara. Oleh itu, hujahan JD bahawa kuasa tersebut mesti diperolehi daripada wasiat dan bahawa keperluan persetujuan semua waris yang dinamakan dalam wasiat sebelum kuasa tersebut boleh dijalankan adalah tidak berasas sama sekali (lihat perenggan 30–31).

(4) JC sewajarnya menyerahkan permohonan untuk mengeluarkan notis kebankrapan dan notis kebankrapan kepada JD itu sendiri dengan mematuhi Kaedah-Kaedah (lihat perenggan 34).

(5) Notis kebankrapan telah diserahkan kepada JD pada 25 Januari 2014 tetapi afidavit JD yang kononnya mencabar jumlah yang dituntut hanya difailkan pada 5 Februari 2014. Notis tersebut tidak diserahkan dalam tempoh tujuh hari yang telah ditetapkan. Tambahan pula, afidavit tersebut tidak mendedahkan bahawa JD mempunyai satu tuntutan balas, penolakan atau tuntutan bersilang terhadap JC yang menyamai atau melebihi jumlah hutang penghakiman. JD juga tidak, melalui notis sebagaimana yang diperuntukkan dalam s 3(2)(ii) Akta Kebankrapan 1967, mempertikaikan jumlah yang sebenarnya dituntut dalam notis kebankrapan itu. Malah, jumlah yang dituntut bersamaan dengan penghakiman. Oleh itu, pendapat JD berhubung jumlah tuntutan yang berlebihan adalah tanpa merit (lihat perenggan 36–38).

(6) JC hanya melaksanakan haknya sebagai wasi untuk menguatkuasakan penghakiman. Tiada yang menghalang seorang litigan untuk mendapatkan hasil daripada penghakiman. Oleh itu, permulaan prosiding kebankrapan tidak dilakukan dengan niat jahat (lihat perenggan 41–42).]

**Notes**

For cases on application to set aside, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3927–3929.

For cases on powers of executors, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2629–2643.

**Cases referred to**

*Bukit Melita Sdn Bhd v Lam Geok Hee & Ors* [1996] MLJU 227; [1997] 4 AMR 3160, HC (refd)

*Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298, SC (refd)

*Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 6 AMR 717, FC (refd)

*J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177, CA (distd)

*Khoo Kay Hock v E J Ketting* [1978] 2 MLJ 57, FC (refd)

*Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, SC (distd)

*McCallum v Country Residences Ltd* [1965] 1 WLR 657, CA (refd)

*Tan Hwee Earn, Re; ex p The People's Insurance Co (M) Sdn Bhd* [1999] 4 MLJ 248, HC (refd)

*Sim Choon Koay (as administrator of the estate of Sim Seoh Beng @ Sim Sai Beng, deceased) & Ors v Koperasi Tunas Muda Sungai Ara Bhd* [2011] 3 MLJ 840, HC (refd)

**Legislation referred to**

Bankruptcy Act 1967 s 3(1)(i), (2)(ii)
Bankruptcy Rules 1969 rr 92, 95, 97, 109, 111
Probate and Administration Act 1959 s 59
Rules of Court 2012 O 56

*Goh Chee Sun (Phee Chen & Ung) for the judgment debtor.*
*Tan Kah Khoo (Gan Teik Chee & Ho) for the judgment creditor.*

**Lim Chong Fong JC:**

INTRODUCTION

**[1]** There are two appeals (encls 46 and 49) before me by the judgment creditor against the decisions of the learned senior assistant registrar dated 16 February 2015 and 3 March 2015 allowing the judgment debtor's applications to set aside the bankruptcy notice (encl 5) and to set aside the creditor's petition (encl 7) respectively.

**[2]** The appeals were heard by way of rehearing pursuant to O 56 of the Rules of Court 2012 on 7 October and 9 November 2015 after the parties filed

A their respective written submissions. These submissions represented the positions and contentions now taken by the parties at the appeals.

**[3]** For purposes of the appeals, the affidavits are:

B (a) judgment creditor's affidavit of service of Yeap Hock Chye affirmed on 27 January 2014;

(b) judgment debtor's affidavit of Khor Boon Hoch affirmed on 5 February 2014;

C (c) judgment creditor's reply affidavit of Toh Beng Han affirmed on 18 February 2014;

(d) judgment debtor's reply affidavit of Khor Boon Hoch affirmed on 11 March 2014;

D (e) judgment creditor's reply affidavit (2) of Toh Beng Han affirmed on 13 March 2014;

(f) judgment debtor's reply affidavit (2) of Khor Boon Hoch affirmed on 5 August 2014; and

E (g) judgment creditor's reply affidavit (3) of Toh Beng Han affirmed on 10 November 2014.

**[4]** On 2 December 2015, I allowed both appeals with costs of RM3,000 and RM1,000 in respect of encls 46 and 49 respectively. The judgment debtor F has on 23 December 2015 filed an appeal against my decisions and I accordingly provide my grounds of decision herein below.

SALIENT FACTS

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**[5]** On 11 March 2013, the judgment creditor obtained summary judgment against the judgment debtor pursuant to Penang Sessions Court Suit No 52–1419–08 of 2012.

H **[6]** The appeal against the summary judgment by the judgment debtor was dismissed by the High Court on 14 November 2013.

**[7]** On 28 November 2013, the judgment debtors made a proposal to the judgment creditor to settle the judgment by way of installment payments. The I proposal was rejected by the judgment creditor on 11 December 2013.

**[8]** Consequently, the judgment creditor on 15 January 2014 filed the request for issuance of bankruptcy notice against the judgment debtor and the bankruptcy notice was served on the judgment debtor on 25 January 2014.

**[9]** On 7 February 2014, the judgment debtor again proposed to the judgment creditor to settle the judgment by way of installment payments and that the bankruptcy proceedings be withheld till the completion of payment. The proposal was rejected by the judgment creditor on the same day.

**[10]** The judgment creditor on 19 February 2014 filed the creditor's petition.

**[11]** The parties thereafter underwent mediation on 14 January 2015 before two mediators.

**[12]** Between 19 January 2015 and 12 February 2015, the parties' solicitors corresponded with each other following the mediation.

**[13]** The learned senior assistant registrar then on 16 February 2015 and 3 March 2015 made the orders to set aside the bankruptcy notice and creditor's petition pursuant to the applications of the judgment debtor.

CONTENTIONS AND FINDINGS

**[14]** The judgment debtor advanced two principal grounds to justify the setting aside of the bankruptcy notice and creditor's petition. They are as follows:

(a) there was a settlement reached between the parties for payment of the sum of RM95,000 by the judgment debtor to the judgment creditor. This settlement created a new cause of action and the judgment creditor is hence precluded from relying on the summary judgment dated 11 March 2013. In this respect, the judgment debtor relied on the English case of *McCallum v Country Residences Ltd* [1965] 1 WLR 657 where Lord Denning MR said as follows at p 660:

> When an action is compromised by a new agreement to pay a sum in satisfaction, it gives rise to a new cause of action. This arises since the writ in the first action, and must be subject of a new action. The plaintiff, in order to get judgment, has to sue on the compromise ...

Reliance was also placed by the judgment debtor on the Malaysian cases of *Bukit Melita Sdn Bhd v Lam Geok Hee & Ors* [1996] MLJU 227; [1997] 4 AMR 3160 and *Sim Choon Koay (as administrator of the estate of Sim Seoh Beng @ Sim Sai Beng, deceased) & Ors v Koperasi Tunas Muda Sungai Ara Bhd* [2011] 3 MLJ 840 to find an estoppel against the judgment creditor;

(b) the bankruptcy notice issued by the judgment creditor is defective for the following reasons:

(i) the service of the bankruptcy notice was wrong in contravention of rr 97 and 109 of the Bankruptcy Rules 1969;

(ii) the judgment creditor acted ultra vires as there was no power conferred upon him under will of Tang Kah Choo, deceased;

(iii) the judgment creditor could not initiate bankruptcy proceedings against anyone including the judgment debtor;

(iv) the judgment creditor commenced bankruptcy proceedings against the judgment debtor without the consent or approval of the beneficiaries under the aforesaid will, particularly Toh Huat Koay who is the father in law of the judgment debtor;

(v) the judgment creditor failed to serve the application to issue the bankruptcy notice to the judgment debtor in contravention of r 92 of the Bankruptcy Rules 1969;

(vi) the particulars of amount owing in the bankruptcy notice is excessive which included interest upon double rental awarded by the court; and

(vii) the bankruptcy notice was not served on the judgment debtor together with application to issue the bankruptcy notice; and

(c) the bankruptcy notice was issued in bad faith.

**[15]** The judgment creditor in gist responded that there was no concluded settlement as alleged by the judgment debtor and in the circumstances, it was proper for the judgment creditor to initiate and proceed with the bankruptcy proceeding. In addition, the bankruptcy notice was properly issued and served on the judgment debtor in good faith at all material times.

**[16]** I will first deal with the issue of the settlement of the judgment debt. This is a question of fact.

**[17]** It is plain there was no formal written settlement agreement executed by the parties herein. The alleged settlement, if any, has to be determined from the communications in the series of exchange of letters between the parties' solicitors.

**[18]** In this regard, it is not disputed that the parties had undergone mediation on 14 January 2015 in attempt to resolve the judgment debt. On 20 January 2015, the judgment debtor's solicitors Messrs Phee Chen & Ung wrote to the judgment creditor's solicitors Messrs Gan Teik Chee & Co enclosing both a letter from Messrs Chua & Co recording the outcome of the mediation and a cheque of RM95,000.

**[19]** Messrs Gan Teik Chee & Co then responded on 21 January 2015 stating that it is holding the said cheque as a stakeholder pending, amongst others, compliance of:

(a) the judgment debtor's withdrawal of all his appeals against the estate of Tang Kah Choo or its executor, the judgment creditor;

(b) the judgment debtor obtaining the consent of all beneficiaries of the estate of Tang Kah Choo to instruct the judgment creditor to accept the settlement sum of RM95,000 instead of the judgment sum of RM321,186.07 owing as at 30 November 2014 subject to full and complete compliance by the judgment debtor of the terms agreed upon; and

(c) the judgment debtor obtaining the consent of all beneficiaries of the estate of Tang Kah Choo to indemnify and the judgment creditor for any loss, damage and/or consequences howsoever upon acting upon their instructions to accept the judgment debtor's offer.

There is also a rider in the last paragraph of the letter which states:

> For avoidance of doubt, if any of the terms cannot be complied with within 2 weeks from the date of this letter, then it means there is no settlement and the Estate of TKC shall proceed to enforce its rights accordingly.

**[20]** On 22 January 2015 Messrs Gan Teik Chee & Co further wrote to the Messrs Phee Chen & Ung enclosing a draft agreement/consent letter incorporating the terms to be complied with by the judgment debtor in consideration of the estate of Tang Kah Choo accepting RM95,000 in lieu of the judgment sum.

**[21]** Subsequently on 11 February 2015, Messrs Phee Chen & Ung wrote to Messrs Gan Teik Chee & Co enclosing four copies of the consent letters incorporating the terms to be complied by the judgment debtor.

**[22]** Messrs Gan Teik Chee replied on the same day stating that the consent letters are different from the contents set out in the draft agreement/consent letter forwarded on 22 January 2015. On 12 February 2015, Messrs Gan Teik Chee & Co returned the aforesaid RM95,000 cheque to Messrs Phee Chen & Ung by reason the judgment debtor is unable to comply with the required terms.

**[23]** I have read the solicitors' letters carefully and am of the view that the parties did not achieve *consensus ad idem*. This consensus is essential to form a binding contract including that of a settlement and this is reiterated in the recent Federal Court case of *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 6 AMR 717. In that case, Jeffrey Tan Kok

Wha FCJ said as follows at pp 328–330 (MLJ); pp 734–736 (AMR):

> [19] The SA, which was executed by one but not the other, might have been a complex and intricate agreement. But yet this appeal only involves a question of basic contract law. One issue is whether or not the parties were at ad idem, which Lord Diplock explained, in *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854 at pp 915–916, in the following terms:
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> > *To the formation of the contract of abandonment, the ordinary principles of the English law of contract apply. To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communication) should coincide.* That is what English lawyers mean when they resort to the Latin phrase *consensus ad idem* and the words that I have italicised are essential to the concept of *consensus ad idem*, the lack of which prevents the formation of a binding contract in English law.
> >
> > Thus if A (the offeror) makes a communication to B (the offeree) whether in writing, orally or by conduct, which, in the circumstances at the time the communication was received, (1) B, if he were a reasonable man, would understand as stating A's intention to act or refrain from acting in some specified manner if B will promise on his part to act or refrain from acting in some manner also specified in the offer, and (2) B does in fact understand A's communication to mean this, and in his turn makes to A communication conveying his willingness so to act or to refrain from acting which mutatis mutandis satisfies the same two conditions as respects A, the *consensus ad idem* essential to the formation of a contract in English law is complete ...
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> [21] 'But where a claim is based on a proved or admitted express agreement, the courts do not require, in addition, proof that parties to an ordinary commercial relationship actually intended to be bound' (*Treitel's The Law of Contract*, (13th Ed) at para 4-026). 'In the case of agreements regulating business relations it follows almost as a matter of course that the parties intend legal consequences to follow' (*Sutton and Shannon* at p 55). '... each party (in commercial contracts) will normally be entitled to assume that a legally-binding agreement had been formed, and so the courts will normally accept that there is a contract as long as the agreement, supported by consideration, is established; they do not require affirmative proof of the parties' intention and indeed, they will presume the intention unless there is proof of no such intention ... one way in which parties may indicate expressly that they do not intend to be legally bound is by expressing pre-contractual negotiations to be 'subject to contract'. But even when the negotiations between commercial parties are complete, they may include in their agreement a provision making clear that it creates no legal commitment' (*Formation and Variation of Contracts* by Cartwright at pp 57–58). *'It is perfectly possible for the parties to an apparent contract to provide that there shall be locus poenitentiae until the terms of their agreement have been reduced to a formal contract ...'* (*Stobo Ltd v Morrisons (Gowns) Ltd* 1949 SC 184 at p 192 per Lord President Cooper) *'... the contract would be concluded when there is agreement formed by the unequivocal acceptance of an offer; and in the case of a*

*written contract there will typically be such an agreement before the final written text is signed by the parties.* In order, therefore to ensure that no prematurely binding contract is concluded through the exchanges, whether oral or written, by which the parties come to their agreement, it should be made clear that the parties will not be bound until they have signed a written document which will itself form the contract. The simplest way to achieve this is to make the negotiations expressly subject to contract' (*Formation and Variation of Contracts* by Cartwright at pp 107–108). 'These words negative contractual intention, so that parties are not normally bound until formal contracts are exchanged' (*Chitty on Contracts*, (30th Ed, Vol 1) at para 2-161, see also paras 2-116–2-120). 'This terminology was traditionally confined to negotiations for the sale of land, but is now more widely used in commercial transactions' (*The Construction of Contracts* by Gerard McMeel, (2nd Ed) at para 14.14) (Emphasis added.)

**[24]** My view is that the parties herein were still ironing out the terms of the alleged settlement. Although the parties had undergone mediation, there is no record of a final executed agreement by the parties that evidences a settlement. It appears to me that only certain preliminary matters were sorted out in principle by the parties in the mediation. In legal parlance, there was only an offer of the judgment debtor on 20 January 2015 that arose from the mediation followed by the counter offer of the judgment creditor on 21 January 2015 and further followed by the counter offer of the judgment debtor on 11 February 2015 from the evidence available before me. There was however at all material times no un-qualified acceptance that signified the attainment of *consensus ad idem*. In fact the judgment creditor also made it clear that the settlement must be completed within two weeks from 21 January 2015, otherwise it is to be treated that no settlement is achieved. The judgment debtor did not accept the judgment creditor's counter offer by that deadline.

**[25]** Consequently, I hold there was no concluded and binding settlement as that alleged by the judgment debtor. In the circumstances, there is neither a new cause of action nor estoppel that operated against the judgment creditor that precluded him from proceeding with bankruptcy proceeding in reliance on the judgment dated 11 March 2013.

**[26]** With that, I next proceed to deal with the judgment debtor's contentions that the bankruptcy notice is defective.

**[27]** The first sub point of contention pertains to the alleged breach of rr 97 and 109 of the Bankruptcy Rules 1969. Rules 97, 109 and 111 read as follows:

97 Service of notice

A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.

109 Personal service

A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

111 Proof of service

(1) Service of the petition shall be proved by affidavit.

(2) The affidavit with a sealed copy of the petition annexed and referred to as an exhibit shall be filed in Court forthwith after service.

**[28]** The judgment debtor herein made a bare allegation of non-compliance with the aforesaid Rules. I noted that the bankruptcy notice dated 15 January 2014 and the request to issue a bankruptcy notice also dated 15 January 2014 were effected on the judgment debtor by personal service. This is confirmed and supported by the affidavit of service of Yeap Hock Chye affirmed on 27 January 2014 but not challenged by the judgment debtor.

**[29]** The second to fourth subpoints of contention of the judgment debtor centred on the purported lack of authority and power of the judgment creditor to initiate bankruptcy proceeding.

**[30]** In this regard, I noted that s 59 of the Probate and Administration Act 1959 provides as follows:

59 Rights of action of personal representative

Subject to any other written law, a personal representative has the same powers to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts due to him at the time of his death as the deceased had when living.

Hence the judgment creditor in his capacity as the executor of the estate of Tang Kah Hoo may commence any legal proceeding including the initiation of bankruptcy proceedings to recover the debt due to the deceased: see also *Khoo Kay Hock v E J Ketting* [1978] 2 MLJ 57 (FC).

**[31]** Furthermore, I do not see that the statutory provision fetters or circumscribes that power of the executor in any way. Thus, the contentions of the judgment debtor that the power must be derived from the will and that the requirement of consent of all named beneficiaries in the will before the power could be exercised are in my view simply unfounded. There is no case authority tendered by the judgment debtor to support that postulation as well.

**[32]** There is also the further connected contention by the judgment debtor that the authority and thus the exercise of power by the judgment creditor has been stayed by an order dated 3 December 2013 of the Penang High Court in Civil Suit No P-02–1713–08 of 2013 and affirmed by the court of appeal in its

decision dated 28 April 2014 in Civil Appeal No P-02(IM)-26–01 of 2014. As the result of these court orders, the judgment creditor is prevented from using his powers to initiate this bankruptcy proceeding at the material time.

**[33]** However as clarified by the judgment creditor, the Penang High Court dismissed Toh Huat Khay's claim to revoke the grant of probate issued to the judgment creditor. In other words, the status of the judgment creditor that has been conferred by the Penang High Court order dated 16 February 2005 in Civil Suit No 22–114 of 1998 and upheld by the orders of the Court of Appeal and Federal Court dated 12 June 2007 and 23 November 2009 stood preserved. From my reading of the aforesaid court orders, I hold that since the High Court dismissed the claim of revocation of the will, the stay order did not have the effect of depriving the judgment creditor from exercising his powers. The stay order merely preserved the status quo and this must be that as held by the Federal Court on 23 November 2009. It would be different if the converse happened: that is to say the revocation of the claim was allowed but there is no subsequent stay order pending appeal.

**[34]** As to the judgment debtor's fifth and seventh subpoints of contention that related on the service of the application to issue the bankruptcy notice, it is again clear from the aforesaid affidavit of service of Yeap Hock Chye that the judgment creditor properly served the application to issue bankruptcy notice and the bankruptcy notice itself to the judgment debtor in compliance with the Bankruptcy Rules 1969. The judgment debtor's contention is hence without merit.

**[35]** Finally in respect of the judgment debtor's sixth subpoint of contention on the excessive sum demanded in bankruptcy notice, the judgment creditor referred to s 3(1)(i) and 3(2)(ii) as well as r 95 of the Bankruptcy Act 1967 and Bankruptcy Rules 1969 which respectively read:

> 3 Acts of bankruptcy
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> (1) A debtor commits an act of bankruptcy in each of the following cases:
>
> > ...(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which

A equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; ...

(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of noncompliance therewith and shall be served in the prescribed manner:

Provided that a bankruptcy notice –

(i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to or done to the satisfaction of the creditor; and

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

95 Application to set aside

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

In addition, the judgment creditor referred to the oft cited case of *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 and submitted that an affidavit cannot operate as an application to set aside a bankruptcy notice unless it is within the contemplation of s 3(1)(i) of the statute. Thus if the debtor wishes to challenge the bankruptcy notice by way of affidavit, he must within seven days file an affidavit to satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt; see also *Re Tan Hwee Earn; ex p The People's Insurance Co (M) Sdn Bhd* [1999] 4 MLJ 248.

**[36]** On the facts herein, the bankruptcy notice was served on the judgment debtor on 25 January 2014 but the judgment debtor's affidavit that supposedly contested the amount claimed was only filed on 5 February 2014. In other words, it was not served within the stipulated seven days. Moreover, the affidavit did not reveal that the judgment debtor has a counterclaim, set off or cross-demand against the judgment creditor which equaled or exceeded the amount of the judgment debt.

**[37]** Be that as it may, the judgment debtor did not also by notice as provided in s 3(2)(ii) of the statute dispute the amount actually due as claimed in the bankruptcy notice.

In fact, the amount claimed tallied with the judgment dated 11 March 2013 and in this regard, the cases of *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177 and *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 are distinguishable because the amounts therein were proven to be erroneous.

**[38]** Therefore, I find and hold that the judgment debtor's contention on excessiveness of the amount claim is also without merit.

**[39]** Since the contentions of the judgment debtor's are rejected by me, I hold that the bankruptcy notice issued by the judgment creditor is valid.

**[40]** The last argument raised by the judgment debtor is that the bankruptcy notice was issued by the judgment creditor in bad faith principally to prevent the judgment debtor from proceeding with other actions to set aside or nullify the grant of probate granted to the judgment creditor. The judgment debtor did not particularise as to how these other actions would be adversely affected as alleged.

**[41]** From the evidence available, it seems to me that the judgment creditor is merely exercising his rights as the executor to enforce the court order dated 11 March 2013. There is nothing objectionable for a successful litigant to pursue the fruits of judgment. Furthermore, I noted that the challenge over the judgment creditor's capacity and authority to act as the executor for the estate of Tang Kah Choo had already longed been decided by the High Court on 13 June 2005 and affirmed by the Court of Appeal on 26 May 2010. There must be finality to legal challenges.

**[42]** In the premises, I am unable to commiserate with the judgment debtor that the initiation of the bankruptcy proceedings was done in bad faith.

A CONCLUSION

**[43]** It is for the foregoing reasons that I have allowed encl 46 as so ordered. It follows that encl 49 must consequently be also allowed as so ordered.

B *Appeals allowed.*

Reported by Kanesh Sundrum

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